IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 05-CV-0329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO AFFIDAVITS IN SUPPORT OF FEES AND EXPENSES AWARDED TO DEFENDANTS

Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter "the State"), pursuant to the Magistrate Judge's May 20, 2008 Opinion and Order, respectfully submits this response in opposition to the affidavits of Defendants' counsel for fees and expenses [DKT #1729].

I. Introduction

As part of his May 20, 2008 Opinion and Order ("May 20 Order"), after granting Defendants' Motion to Compel Data Production ("Motion to Compel"), Magistrate Judge Joyner found it appropriate to award attorney fees and expenses to Defendants under Rule 37(a) and (b) of the Federal Rules of Civil Procedure and ordered Defendants to file an "itemized statement of costs and expenses . . . ." *See* DKT #1710 at 6. In response to the May 20 Order, on June 19, 2008, Defendants' counsel filed three affidavits. *See* DKT #1729.

In the interim, the State has filed Objections to the May 20 Order, arguing that the grant of the Motion to Compel and award of fees and expenses is clearly erroneous and contrary to

law. *See* DKT #1716. The State's Objections are currently pending before the Court. In those Objections, the State points out: (1) that Defendants failed to comply with their meet and confer obligations under Fed. R. Civ. P. 37(a)(1), Fed. R. Civ. P. 37(a)(5)(A)(i) or LCvR 37.1 prior to filing their Motion to Compel, and that therefore the Magistrate Judge was prohibited from even hearing the Motion to Compel, let alone granting it and awarding attorney fees and expenses; (2) that the award of attorney fees and expenses is contrary to the "substantially justified" and "other circumstances" provisions of Fed. R. Civ. P. 37(a)(5)(A); (3) that the finding of a violation of Rule 26(e)(1) was erroneous; and (4) that the request for attorney fees and expenses was, in any event, not appropriately raised. *See* DKT #1716. Indeed, it should not be ignored that, had Defendants merely complied with their meet and confer obligations, none of the attorney fees and expenses they now seek would have been incurred.

Nonetheless, because the Court has yet to rule on the State's Objections, the May 20 Order currently stands. As shown below, even assuming *arguendo* that Defendants were entitled to fees and expenses, the fees and expenses sought ($12,945.42) by Defendants are excessive and should be substantially reduced.[1]

II. Legal Standard

It is well established that the proper method for awarding attorney fees under Rule 37 is the lodestar method, in which the court multiplies a reasonable hourly rate by a reasonable number of hours expended. *See Cobell v. Norton*, 231 F. Supp. 2d 295, 300 (D.D.C. 2002); *Standard Oil Co. v. Osage Oil & Transportation, Inc.*, 122 F.R.D. 267 (N.D. Okla. 1988) (applying fee award analysis set out in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), in Rule

[1] The State submits that the Court should defer hearing the request for fees and expenses until after there is a ruling on the State's Objections. Alternatively, if the Court does nevertheless decide to proceed with a hearing on Defendants' request, it should defer any payment of fees and expenses until after there is a ruling on the State's Objections.

37 proceeding); *Allahverdi v. Regents of the University of New Mexico*, 2006 WL 1304874, *4 (D.N.M. April 25, 2006); *Greig v. Thibodeaux*, 2006 WL 2349588 (W.D. La. Aug. 10, 2006). "The touchstone inquiry is whether the time expended on particular tasks was reasonable. Parties cannot be reimbursed for nonproductive time or duplicative activities." *Cobell*, 231 F. Supp. 2d at 306. In the event a party submits an unreasonable application for reimbursement of fees and expenses, the court should reduce the application accordingly to meet the standard of reasonableness. *See, e.g., Standard Oil*, 122 F.R.D. at 267-69. In making the determination of reasonableness, the district court must ensure that the attorneys have exercised "'billing judgment.'" *Ramos*, 713 F.2d at 553 (quoting *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980)). "Billing judgment consists of winnowing the hours actually expended down to the hours reasonably expended." *Case v. Unified School District No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998) (citing *Ramos*, 713 F.2d at 553).

III. Argument

A. The Rhodes, Hieronymus fees and expenses should be denied in their entirety

The Cargill Defendants request a total of $964.00 of fees and expenses which they claim was incurred by the Rhodes, Hieronymus law firm. *See* DKT #1729 at 7. However, the affidavit provided to the Court by the Rhodes, Hieronymus firm fails to comply with this Court's directive to provide "an itemized statement of costs and expenses." The affidavit provides no information as to the total number of hours spent, the number of hours spent on each task, or the number of hours billed by particular timekeepers. *Id.* at 6–7. What is more, the Rhodes, Hieronymus firm fails to disclose its requested hourly rates. *Id.* Simply put, the Rhodes, Hieronymus firm has omitted the most basic information the Court would need to assess the reasonableness of the fee request (*i.e.*, requested hours and hourly rates). Based on the lack of information provided, the

Court cannot even begin the process of arriving at a reasonable number of hours or reasonable hourly rates. It is simply not possible for the Court to calculate the lodestar amount. Thus, the Rhodes, Hieronymus fee request is facially insufficient and should be denied in its entirety.

B. The Sanders fees should be reduced

Robert E. Sanders ("Mr. Sanders") has filed an affidavit with the Court seeking $5,300.00 in attorney fees and $749.29 in travel expenses. *See* DKT #1729 at 9. Mr. Sanders represents the Cal-Maine Defendants.

Mr. Sanders is seeking 13.40 hours of attorney time (or $2,680.00) spent in preparing for oral argument on Defendants' Motion to Compel. DKT #1729 at 8. On its face, 13.40 hours is excessive preparation time for oral argument on this straightforward discovery motion. It appears that Mr. Sanders spent much of his oral argument preparation time "getting up to speed" on the Motion to Compel. Indeed, from the limited information provided to the Court, it seems that lawyers for the Cargill Defendants did the bulk of the work on the Motion to Compel and subsequent briefing. Absolutely no explanation is given for why it was necessary for Mr. Sanders -- who, by all appearances, has had only tangential involvement in the discovery issues pertaining to the sampling data and materials -- to be tasked with the oral argument duties. Had Mr. Sanders been working on the Motion to Compel all along, he plainly would not have needed so much time to prepare for oral argument. Therefore, most of his preparation was either unnecessary or duplicative. The State submits that reasonable preparation for the oral argument by an attorney who was already up to speed on the issues would have been approximately three to four hours. Accordingly, although the State continues to object to any award of sanctions for the reasons set forth in its Objections, assuming *arguendo* that an award were appropriate, a 60% reduction of the oral argument preparation time submitted by Mr. Sanders would be warranted.

C. The Faegre & Benson fees should be reduced

The Cargill Defendants also seek $5,932.16 in attorney fees which they claim to have incurred in connection with the work of a second law firm, Faegre & Benson. *See* DKT #1729 at 5. The claimed $5,932.16 in fees consists of 20.50 hours billed by Kristin Shults Carney ("Ms. Carney"), an associate in Faegre & Benson's Denver office. *Id.* at 2-3.

In the affidavit submitted by Delmar Ehrich -- a partner with Faegre & Benson -- he asserts there were at least two other Faegre & Benson attorneys (aside from Ms. Carney) who spent a significant amount of time working on the Motion to Compel. DKT #1729 at 2-4. In fact, Mr. Ehrich claims that in total, the Faegre & Benson lawyers billed over 95 hours related to Defendants' Motion to Compel. *Id.* at 4. Ninety-five billed hours on a relatively straightforward motion to compel is facially unreasonable and calls into question the reasonableness of all aspects of the fee request by Faegre & Benson. Just as importantly, Mr. Ehrich's affidavit only provides an itemization of Ms. Carney's billed hours. Without the itemized time of the other Faegre & Benson lawyers and the context such information would provide, it is simply not possible to determine how much of Ms. Carney's time was truly necessary or to what extent her billed hours were duplicative of the other lawyers' time and work. Accordingly, the Cargill Defendants have provided insufficient information for the Court to make any determination as to the reasonableness of Ms. Carney's billed hours. Due to the lack of documentation of hours spent by other lawyers and facially unreasonable amount of time spent by Faegre & Benson on the Motion to Compel as a whole, the State maintains that -- again assuming *arguendo* that an award were appropriate (which the State does not agree it is) -- Ms. Carney's hours should be reduced by at least 60%.

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I certify that on the 7th day of July, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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